

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ACCENT DELIGHT INTERNATIONAL LTD.  
and XITRANS FINANCE LTD.,

Plaintiffs,

-against-

SOTHEBY'S and SOTHEBY'S, INC.,

Defendants.

18 Civ. 9011 (JMF)

**PLAINTIFFS'  
STATEMENT OF  
MATERIAL FACTS  
PURSUANT TO  
LOCAL CIVIL RULE 56.1**

Plaintiffs submit the following Statement, pursuant to Local Rule 56.1, of Material Facts as to which Plaintiffs contends there is no genuine issue to be tried:

1. In December 2016, Plaintiffs and Sotheby's (including its New York, English, Swiss and Austrian subsidiaries) entered into a one-year written tolling agreement. Declaration of Daniel J. Kornstein dated September 20, 2019 ("Kornstein Decl.") Ex. A.

2. Paragraphs 3, 4 and 8 of the tolling agreement provide:

3. Each Party shall provide at least 14 days' written notice ("Notice of Suit"), as provided in paragraph 8, prior to filing or commencing any litigation or other legal proceeding against any other Party based on the Claims or Defenses or otherwise asserting any of the Claims or Defenses against any other Party.

4. This Agreement shall terminate (a) 14 days after any Party serves a "Notice of Suit" on any other Party; (b) 14 days after any Party serves written notice of termination on the other Parties, as provided in paragraph 8 below; or (c) one year after the Effective Date, whichever is earliest (the "Termination Date").

....

8. All notices required hereunder shall be in writing and shall be deemed duly given one (1) business day after being sent to the recipient at the address given below by reputable overnight courier service (charges prepaid), as follows . . .

Kornstein Decl. Ex. A ¶¶ 3, 4, 8.

3. By letter dated October 27, 2017, filed on the Court's electronic filing system, Plaintiffs asked this Court for permission to use the prior § 1782 discovery "in new foreign proceedings soon to be commenced in the UK against Sotheby's UK, one of its employees, and YB." ECF No. 55-2.

4. At no time did Plaintiffs or their counsel serve the October 27, 2017 letter on Sotheby's or its counsel by overnight courier. Kornstein Decl. ¶ 3.

5. At no time did Plaintiffs or their counsel serve upon Sotheby's by overnight courier any other document providing notice of an anticipated lawsuit against Sotheby's. Kornstein Decl. ¶ 4.

6. Sotheby's filed a civil proceeding in Geneva, Switzerland on November 17, 2017 against Plaintiffs (among others) without complying with the notice provision of the tolling agreement quoted above. ECF No. 55-3.

7. The purpose of this filing was to invoke the international Lugano Convention to block a contemplated suit by Plaintiffs in the United Kingdom. Under the Lugano Convention, if a suit is filed in a signatory country—such as Switzerland—if another suit is filed in a court in a second country, the second jurisdiction must stay its proceedings until jurisdiction in the first court has been established. Once the jurisdiction of the first court has been established, the proceedings in the second court must be dismissed. ECF No. 55-4.

8. Sotheby's did not give any advance notice of any kind that it was filing a civil action in Switzerland, much less 14 days written notice sent by overnight courier service to Plaintiffs' counsel. Kornstein Decl. ¶ 5.

9. Plaintiffs did not breach the tolling agreement while it was in effect. Kornstein Decl. ¶ 6.

Dated: New York, New York  
September 20, 2019

EMERY CELLI BRINCKERHOFF  
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